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No. 89-1117

In The

Supreme Court of the United States

October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,

Petitioner,

vs.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS – COUNTY OF HARRIS,

Respondents.

REPLY BRIEF TO RESPONDENT HUFFMAN INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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RULE 29.1 LIST

A complete list of Petitioner First National Bank of Bellaire's parent companies, subsidiaries, and affiliates is included in the petition for writ of certiorari.

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To the Supreme Court of the United States:

First National Bank of Bellaire ("Bellaire"), Petitioner, respectfully submits this reply brief to Respondent Huffman Independent School District's ("Huffman") brief in opposition to petition for writ of certiorari.

STATUTORY PROVISIONS

Section 1.11(a) of the Texas Tax Code provides as follows: "On the written request of a property owner, an appraisal office or an assessor or collector shall deliver all

notices, tax bills, and other communications relating to the owner's property or taxes to the owner's fiduciary."

Section 23.52(a) of the Texas Tax Code provides as follows: "The appraised value of qualified open-space land is determined on the basis of the category of the land, using accepted income capitalization methods applied to average net to land. The appraised value so determined may not exceed the market value as determined by other methods."

ARGUMENT

Respondent Huffman raises three points that should be briefly addressed: (1) the case is moot since Bellaire paid the 1985 taxes claimed by Huffman; (2) the appraised value of the property was not increased in 1985; and (3) Bellaire should have requested notice of the tax administrative proceedings as a "fiduciary" of the owner of the property.

A. The case is not moot.

First, the case is not moot. The 1985 taxes claimed by the State of Texas – County of Harris, one of the Respondents, have *not* been paid. For that reason alone, the case is not moot.

After the petition for certiorari was filed in this case, an officer of Bellaire did pay the 1985 taxes claimed by Huffman when he received a demand for the taxes along

with additional penalties and interest.[1] Evidencing his intent to make only an escrow payment, however, the officer noted on the check that those taxes were paid "subject to appeal to the Supreme Court." Upon learning of the payment during a phone conversation with Huffman's attorney a few days after the payment, counsel for Bellaire immediately notified counsel for Huffman in writing and demanded that the payment be returned unless it was agreed that the taxes would be refunded should Bellaire ultimately prevail in this suit. The payment was not returned.

The Texas courts have not been generous in providing remedies to taxpayers. When taxes are paid while an appeal concerning the taxes is pending under circumstances similar to those here, however, the Texas Supreme Court has held that the appeal is not moot and the taxes paid may be recovered. *Highland Church of Christ v. Powell*, 640 S.W.2d 235 (Tex. 1982). No one is misled into thinking that the litigation is concluded and the decision may provide guidance in the future. *Id.* In any event, the state court after hearing the circumstances surrounding payment may decide the question of whether Bellaire is entitled to return of the Huffman taxes on remand should this Court hold that Bellaire was denied due process under the Texas tax system. Thus, the important question

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[1] It is not clear that all of the 1985 Huffman taxes have been paid. Appendix A to Huffman's brief in opposition shows that $13,285.68 in penalties and interest were claimed by Huffman if payment was made in January 1990, while that same tax record shows that only $9,489.80 in penalties and interest were paid.

presented in this case as it relates specifically to Huffman, like the identical question relating to Harris County, is also not moot.

B. The appraised value of the property was increased in 1985.

Second, Huffman misconstrues the Texas system when it asserts that the appraised value of the property was not increased in 1985 but instead the land simply did not receive an agricultural "credit" in that year. If an owner applies for land to be appraised as "agricultural," "timberland," or some other special designation, the Tax Code provides that a different method for appraising the property may be used. For instance, "open-space" or agricultural land is appraised "using accepted income capitalization methods" as opposed to the fair market value approach. Tex. Tax Code Ann. § 23.52(a) (Vernon 1982). The alternative method of appraising property might result in a lower value than if it is appraised under the fair market value method, in which case the taxpayer's tax liability is reduced. The taxpayer does not, however, get a "credit" if his property receives a special designation.

Regardless of which method was used to appraise the property in 1984 or 1985, however, in this case the appraised value for tax purposes dramatically increased in 1985. Contrary to Huffman's assertion, Bellaire does not claim that it had a right to require that a particular method be used in appraising the property. Under the Fourteenth Amendment, Bellaire had the right to challenge the amount of the appraisal whether fair market

value or some other approach was used. When the State appraises the property and assesses the taxes that are automatically secured by a superior lien, Bellaire's interest in the property is diminished, (in this case significantly so) and it is entitled to due process in terms of contesting the amount of the tax and the State's action in appraising the value of the property on which the amount of the tax depends. Because Bellaire was denied that right in any forum, it was not afforded due process.

C. Bellaire is not a fiduciary and, thus, cannot request notice under the Tax Code.

Huffman also asserts that Bellaire could have received notice of the 1985 appraised value of the property as a "fiduciary" of the owner *if* the owner had consented to delivery of such notice to Bellaire rather than to himself.[2] Tex. Tax Code Ann. § 1.11(a) (Vernon 1982). A "fiduciary," however, is a trustee, a partner, or an officer of a corporation, as in *MCI Telecommunications Corp. v. Tarrant County Appraisal District*, 723 S.W.2d 350 (Tex. App.–Fort Worth 1987, no writ), the case cited by Huffman. The term would not include a lienholder.

Moreover, even if a lienholder is a "fiduciary," Bellaire would have been required to get the landowner to give up his right to tax notices in order for Bellaire to

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[2] The Texas Tax Code provides that a property owner may request that all notices, tax bills, and other communications relating to the owner's property or taxes be delivered to the owner's fiduciary. Tex. Tax Code Ann. § 1.11(a) (Vernon 1982). Under that section, the designated fiduciary would receive the notices instead of the owner.

receive them. The landowner is unlikely to want to give up his right to notice and hearing, and there is no reason he should be forced to make that choice. The only reason to have him make the choice is to enable Huffman to preempt Bellaire's lien, but it is Huffman that should be faced with a choice. Huffman can either send the notice to the lienholder and allow an opportunity to be heard, and, thus, retain its right to a superior lien, or it can deny notice and an opportunity to be heard and maintain a subordinate lien. Under the Fourteenth Amendment, Bellaire's right to due process should not depend on its ability to convince the property owner to give up the owner's right to due process and to appoint Bellaire as the owner's fiduciary to act on his behalf. Furthermore, due process should not require Bellaire to take on the burden of serving as the owner's fiduciary in order to receive notice and an opportunity to be heard with the inherent conflicts that might arise.[3]

Again, however, Huffman's contention misses the point. As it stated in its brief to the Texas court of appeals: "Even if notice of tax assessments and values were given to all lienholders, only *property owners*, or their agents, can contest valuations and appeal from same. *See, e.g., Bennett-Barnes Investments Co. v. Brown County Appraisal District*, 696 S.W.2d 208 (Tex. App.–Eastland 1985, writ ref'd n.r.e.)." Brief of Huffman in court of appeals at 15-16 (emphasis original). The Texas courts

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[3] The price Huffman would exact from individuals for due process, if it could be obtained at all, is, thus, far greater than the price of a postage stamp as Huffman has suggested. Huffman's brief in opposition at 20.

have agreed, leaving the lienholder whose interests are significantly affected by the tax authorities powerless to contest their actions. Empty notice of tax appraisals and tax foreclosures without the right to be heard does not constitute due process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its petition be granted and that the judgment and decision of the court of appeals be reversed and that judgment be rendered that Respondents take nothing, or alternatively that this case be remanded for trial or other proceedings.

Respectfully submitted,

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